STATE OF MICHIGAN

COURT OF APPEALS

JOANN JENNINGS, Plaintiff-Appellee,	UNPUBLISHED February 28, 2008
v	No. 274303 Genesee Circuit Court
NEW ATTITUDES BEAUTY SALON, INC., Defendant-Appellant.	LC No. 05-082462-NO

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying its motion for summary disposition. This premises liability case arises out of an injury to the left ankle that plaintiff suffered when she slipped and fell on what is at the time described as "black ice" in defendant's parking lot. Defendant contends that there is no genuine issue of material fact that the black ice was open and obvious and no special aspects of the black ice made it unreasonably dangerous. Defendant also contends that it had no notice of the black ice. We agree with defendant that the condition of the parking lot was open and obvious and that no special aspects existed. Accordingly, we reverse.

I. FACTS

On February 26, 2004, plaintiff visited defendant salon twice. The first visit took place between 2:00 p.m. and 3:00 p.m., when plaintiff went inside to inquire about prices and products needed for a hairstyle. She had no difficulty walking through the parking lot and she did not notice any snow or ice. Plaintiff then left and returned to the salon at approximately 3:30 p.m. Once again, she did not notice any ice or moisture on the ground near her car and she had no problems walking inside through the lot. Plaintiff spent a few hours inside the salon, getting her hair done.

Plaintiff exited defendant salon between 6:00 p.m. and 6:30 p.m. She approached the driver's side of her car and began to put her key in the door when she fell. She was in pain, but she felt the pavement was slippery and cold. Plaintiff did not, however, notice any salt or deicing material in the parking lot. Plaintiff's left ankle was throbbing, so "[i]t took [her] a while" to stand up by herself. She was unable to return to the salon to report her fall. Instead,

plaintiff used her right foot to drive home and sought medical treatment at a local medical center later that evening.

According to plaintiff, February 26, 2004, was a "nice day." It was not snowing or raining, and plaintiff could not remember when it had snowed last in the area. Weather data showed a high of 40 degrees and a low of 21 degrees for Flint on February 26, 2004, with an observed temperature of 35 degrees at 7:00 p.m., shortly after the accident.

Plaintiff filed a complaint against defendant, alleging that it breached its duty of care owed to her. Defendant moved for summary disposition, asserting that the condition was open and obvious, absolving defendant of liability. Further, defendant argued that it did not have actual or constructive notice of the ice, also absolving defendant of liability. The trial court denied defendant's motion, holding that there was a question of fact whether the black ice was an open and obvious condition and whether defendant had notice of it.

II. STANDARD OF REVIEW

We review a trial court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id.* "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald*, *supra* at 332.

III. ANALYSIS

In a premises liability action, the plaintiff must prove the elements of a negligence claim: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the injury proximately resulted from the breach; and (4) the plaintiff suffered damages. *Hampton v Waste Mgt of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999). Different standards of care are owed to a plaintiff in accordance with the plaintiff's status on the land. A business owner's patron is an invitee. See *Brown v Brown*, 478 Mich 545, 560; 739 NW2d 313 (2007). The invitor has a common law duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

Although an invitor must exercise reasonable care for the protection of an invitee, the invitor is not an absolute insurer of the safety of an invitee. *Anderson v Wiegand*, 223 Mich App 549, 553-554; 567 NW2d 452 (1997). An invitor is not required to protect an invitee from open and obvious conditions. *Lugo*, *supra* at 516-517. A condition is open and obvious if "'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Corey v Davenport College of Business* (*On Remand*), 251 Mich App 1, 5; 649 NW2d 392 (2002), quoting *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 475; 499 NW2d 379 (1993). This test is objective. The question is

"'whether a reasonable person in [plaintiff's] position would foresee the danger.'" *Id.* at 5, quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). Even if a condition is open and obvious, however, a plaintiff may recover if "special aspects" exist that render an open and obvious condition unreasonably dangerous. *Lugo, supra* at 516-517.

Absent special circumstances, the danger presented by the accumulation of ice and snow is "open and obvious, and do[es] not impose a duty on the property owner to warn of or remove [the danger]." *Teufel v Watkins*, 267 Mich App 425, 428; 705 NW2d 164 (2005); *Corey, supra* at 4-5, 8. In *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 101; 689 NW2d 737 (2004) (*Kenny I*), rev'd 472 Mich 929 (2005) (reversing for the reasons adopted in the dissenting opinion in *Kenny I*) (*Kenny II*), the plaintiff parked in the defendant's parking lot. It was dark, the lot was covered by one inch of snow and there were light snowflakes falling. *Id.* at 101-102. Other pedestrians held onto their cars as they walked. *Id.* at 109 n 3, 115. The plaintiff fell on black ice, which was camouflaged by the snow on the ground. *Id.* at 102-103, 115. There was no evidence of rainfall or thawing to put the plaintiff on notice that ice was likely. *Id.* at 108. Two other pedestrians fell on the same ice shortly after the plaintiff's fall. *Id.* Nevertheless, the Supreme Court, in *Kenny II, supra* at 929, affirmed the trial court's grant of summary disposition, relying on the dissent in *Kenny I.* The dissent held that the open and obvious doctrine applied in this case. *Kenny I, supra* at 119. The hazard would have been open and obvious to an individual of average intelligence. The plaintiff saw others hang onto the car for support. She knew it was snowing. Despite the darkness, the plaintiff was a lifelong Michigan resident who "should have been aware that ice frequently forms beneath snow . . . ." *Id.*

In this case, plaintiff knew or should have known of the danger presented by black ice in a parking lot. Like the plaintiff in *Kenny I, supra* at 119, plaintiff was a Michigan resident. She fell on February 26, 2004. She traversed the parking lot several times that day without incident. She fell in the evening, when it was dark outside. It was 35 degrees when she fell, but the temperature had fluctuated between 21 and 40 degrees that day. There was no precipitation that day, but snow remained in piles adjacent to the parking spaces. Plaintiff did not notice ice or snow in the parking lot until she fell and felt the pavement was slippery and cold. Relying on *Kenny II, supra* at 929, because plaintiff was a lifelong Michigan resident, she should have been aware that ice forms from water running off melting snow piles in February and does not melt immediately with minor temperature fluctuations above freezing. Therefore, this Court concludes that there was no question of fact that an open and obvious condition existed.

Defendant next contends that there were no special aspects of the black ice that made it unreasonably dangerous despite its open and obvious nature.

> Special aspects that serve to remove a condition from the open and obvious danger doctrine are those that "give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided . . . ." [I]llustrations of special aspect conditions [are] (1) "an unguarded thirty foot deep pit in the middle of a parking lot" resulting in a fall of an extended distance and (2) standing water at the only exit of a commercial building resulting in the condition being unavoidable because no alternative route is available. [L]iability would not be imposed "merely because a particular open and obvious condition has some potential for severe harm." [*Corey, supra* at 4, quoting *Lugo, supra* at 518-519 (internal citations omitted).]

In this case, the risk of slipping and falling on ice is not sufficiently similar to those special aspects discussed in *Lugo*, which would constitute a uniquely high likelihood or severity of harm and remove the condition from the open and obvious danger doctrine. *Corey*, *supra* at 6-7 (ice-covered steps did not create a uniquely high likelihood of harm or severity of harm). First, plaintiff avoided the black ice when she exited her vehicle and walked into the salon. She also avoided the black ice on her previous trip to the salon earlier that day. Further, the black ice by her driver's side door was avoidable, as plaintiff could have entered her car from the passenger's side door. While plaintiff contends that falls are the leading cause of nonfatal injuries that are treated in hospital emergency rooms, the risk of harm from slipping and falling on ice is less severe than falling an extended distance due to the 30-foot hole described in *Lugo*. *Lugo*, *supra* at 518-519.

For the above reasons, we conclude that the condition of the parking lot was open and obvious and that no special aspect existed making the condition unreasonably dangerous. Therefore, the trial court erred by denying defendant's motion for summary disposition.[1]

Reversed. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Bill Schuette

[1] Given our resolution of this issue, we decline to address defendant's other issue raised on appeal, i.e., whether defendant was on notice of the condition.